IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.559 OF 1993

1. Mr.Dhirajlal Chhotalal Parekh
6A, 'A' Wing, Gazdar Apartments,
Juhu Tara Road, Juhu,
Bombay - 400 049.

2. Shilpkar Weaves Pvt. Ltd.
27/9, AB Samitha Complex,
Andheri Kurla Road,
Sakinaka, Bombay - 400 072. **..Petitioners**

VERSUS

1. The Appropriate Authority,
Constituted of the Members :
i) S.K.Laul,
Chief Engineer.
ii) S.C.Tiwari
Commissioner of Income - tax.
iii) C.M.Betgeri
Commissioner of Income - tax
appointed by Central Government
u/s.269UB of the Income Tax Act,
1961 having its office at 3rd Floor,
Mittal Court, 'A' Wing,
Nariman Point, Bombay - 400021.

2. Union of India. **..Respondents**

Mr.K.B.Bhujale for the Petitioners.
Mr.R.Ashokan for the Respondents.

CORAM :- DR.S.RADHAKRISHNAN &
V.C.DAGA, JJ.
DATE : 5TH JUNE, 2007

JUDGMENT (PER : DR.S.RADHAKRISHNAN,J.)

1. By this Petition, the Petitioners are challenging the order dated 24th February,1993, passed by the Commissioner of Income Tax under Section 269UD(1) of the Income Tax,1961 (hereinafter referred to as "the Act"). The Petitioners have also prayed for a direction to the Respondent No.1 for grant of 'No Objection Certificate' in respect of the

transaction in question, and for a further direction that the Respondent No.1 should determine the consideration payable by the Government including the reduced amount of Rs.1,04,905 and Rs.13,75,000/- being the consideration for the transfer of furniture, fittings and fixtures. The Petitioners have further prayed that the Central Government be directed to make good the loss caused to the Petitioners and pay the amount with interest. It is further prayed by the Petitioners for an injunction restraining the Respondents from proceeding further by way of taking possession of the said property, in pursuance of the impugned order.

2. The brief facts of the case are that the Petitioner No.1 had purchased the property being Flat No.6A, 'A' Wing, Gazdar Apartments, Juhu Tara Road, Juhu, Bombay - 400 049 (hereinafter referred to as the "said property") from Shri.Jimmy Gazdar under a tripartite agreement dated 28th July,1986 between the Petitioner No.1, the landlord Shri.Jimmy Gazdar and the Builders for a consideration of Rs.17,31,200/-, accordingly, the Petitioner No.1 had become a member of the Juhu Gazdar Cooperative Housing Society and had occupied the said Flat.

3. It is the case of the Petitioner, that thereafter the Petitioner No.2 had offered the Petitioner No.1 to purchase the said property along

with furniture, fixtures and fittings for a sum of Rs.71,99,000/- out of which Rs.13,75,000/- was towards the cost of furniture, fixtures and fittings. The Petitioner No.2 was ready and willing to pay the full amount immediately. The Petitioners were under bonafide impression that the immovable property referred to in Section 269UC of the Act, and the consideration referred to therein is pertaining to the said property excluding the furniture, fixtures and fittings. Accordingly, they had entered into an agreement dated 22nd May,1992 fixing a consideration of Rs.58,24,000/- for the said flat excluding the said furniture, fixtures and fittings. It is mentioned in the agreement that the consideration for the said furniture, fixtures and fittings would be separately fixed by the parties.

4. It is further submitted by the Petitioners that, as required under the provisions of Chapter XXC of the Act, the Petitioners had filed Form No.37-I in the office of the First Respondent on 19th June,1992. Thereafter, the Respondent No.1 had sought further information and clarification regarding the agreement between the Petitioners. Therefore on 22nd July,1992, the Petitioners had furnished necessary information and clarification including a copy of the proposed agreement for transfer of furniture to the Respondent No.1.

5. It appears that on 27th August,1992, the Respondent No.1 had passed an order under Section 269UD(1) of the Income Tax Act, which was received by the Petitioner on 28th August,1992 ordering the purchase of the said property by the Central Government for a consideration of Rs.57,19,095/-. It was stated in the said order that the consideration for transfer of immovable property in question was Rs.58,24,000/-. The Central Government had worked out the consideration amount at Rs.53,76,145/-, after deducting an amount of Rs.1,04,905/- and amount of Rs.2,93,700/- & Rs.49,250/- were ordered to be retained in the account of the Respondents.

6. Aggrieved thereby, the Petitioners had challenged the above order dated 27th August,1992 by filing a Writ Petition No.2039 of 1992, and this Court had set aside the aforesaid order dated 27th August,1992 passed by the Respondents, and the Respondents were permitted to issue fresh show cause notice.

7. Thereafter, on 15th January,1993, the Petitioners had received a letter dated 4th January,1993 issued by the Respondents requiring the Petitioners to show cause as to why an order should not be passed under Section 269UD(1) of the Income Tax Act, however while issuing such a letter, no reasons of whatsoever nature for passing an order under

Section 269UD(1) of the Income Tax Act had been furnished in the said letter. In pursuance of the said letter dated 4th January,1993, the Petitioners had filed their written statement, specifically asking for material particulars and reasons for issuance of the said letter. Thereafter Respondent No.1 had passed an order of purchase under Section 269UD(1) of the Income Tax Act on 24th February,1993. Hence, the present Petition has been filed by the Petitioners interalia praying for quashing and setting aside the impugned order dated 24th February,1993.

8. Mr.Bhujale the learned Counsel for the Petitioners pointed out that the Respondents' show cause notice dated 4th January,1993 was not a show cause notice at all, but an order under Section 269UD(1) of the Act, as the following part makes it clear:

> "Consequently, we are satisfied that this is a fit case for exercising the pre-emptive right of purchase by the Central Government under Section 269UD(1) of the Chapter XXC of the Income Tax Act,1961 and an order under Section 269UD(1) is being passed accordingly."

. The above portion clearly shows that an order under Section 269UD(1) of the Act is being passed accordingly.

9. Mr.Bhujale also pointed out that the Petitioners in their reply dated 19th January,1993 had specifically sought details, particulars of two sale

instances referred, which were never furnished to the Petitioners.

10. Hence, Mr.Bhujale strongly contended that the impugned order was a pre-determined order and clearly violative of principles of natural justice.

11. The learned Counsel appearing on behalf of the Petitioners contended that the impugned order passed by the Commissioner of Income Tax was on the basis of rates wrongly determined and therefore the said order is bad in law. According to him, the rate of Rs.3124/- per sq.ft. of the said property was wrongly determined and the correct rate should have been Rs.3325/- per sq.ft. The learned Counsel for the Petitioners also submitted that after including price for marble flooring and staircase the rate will be increased further by Rs.175/- per sq.ft., and in fact the Appropriate Authority had wrongly determined the rate of Rs.3124/- per sq.ft. by reducing discount, registration fees, stamp duty and transfer fees. The learned Counsel has further submitted that in the instant case, there was no understatement of consideration. The learned Counsel for the Petitioners further contended that the transactions relied on by the Respondent No.1 are not valid basis, as the first transaction of sale referred to in paragraph No.4 of the recorded reasons in respect of Flat No.21 of B-Wing, Gazdar Apartment, was not in

existence, and as regards the other two transactions, those were prima facie not comparable, as is apparent from the facts regarding Flat No.103. The learned Counsel for the Petitioners contended that even if the rate of Rs.3325/- per sq.ft. is taken into account, there would be difference of less than 15%. It is also contended that for comparison, Rs.3386/- per sq.ft. should be taken as the rates of the three instances relied on by Appropriate Authority seems to be basic rates.

12. It is further submitted by the learned Counsel for the Petitioners that the comparable transactions in the Gazdar Apartments proving thereby that there was no understatement of consideration, relied upon by the Petitioners were not considered at all. According to the learned Counsel for the Petitioners, the instances referred to in the notice issued by the Appropriate Authority were not comparable with the subject property, and hence the order of purchase is not valid. The learned Counsel for the Petitioners has contended that the relevant material being the Valuation Report, Note of Deputy Commissioner of Income Tax and material/information regarding transactions relied on by the Appropriate Authority were not at all furnished, though demanded by the Petitioners' reply dated 19th January,1993. Therefore, the learned Counsel for the Petitioners contended that the impugned order was clearly

violative of principles of natural justice, as the material relied upon by Respondents were never furnished to the Petitioners.

13. It is further case of the Petitioners that the market value of the subject property was not determined and only an observation was being made that the apparent consideration was low. The learned Counsel for the Petitioners has submitted that it was not sufficient to prove understatement or that the difference was more than 15% and there was no valid basis for presumption of attempt to evade tax. Lastly, the learned Counsel for the Petitioners has submitted that the impugned order dated 24/02/1993 is invalid and void-ab-initio, as there was no positive finding that there was an attempt to evade tax, and accordingly, the impugned order is liable to be quashed and set aside.

14. In reply to the contentions of the Petitioners, the learned Counsel for the Respondents Mr.Ashokan, relied on the affidavit-in-reply stating that all the procedural as well as material formalities, which were required to be carried out, were so carried out by the Appropriate Authority and thereafter, a speaking order was passed, wherein the Respondents have recorded reasons for passing such an order. It is the case of the Respondents that while passing the impugned order, adequate care was taken

after giving a reasonable opportunity of hearing. Mr.Ashokan contended that the Respondents had personally visited to the site in question before passing the order under Section 269 UD of the Income Tax Act. However, Mr.Ashokan could not controvert the contention of the Petitioners that all relevant materials and particulars relied upon by the Respondents were never furnished to the Petitioners. Mr.Ashokan also could not justify on what basis the show cause notice itself passes an order under Section 269UD(1) of the Act.

15. We have also perused the the judgment of this Court in the case of **Mrs.Nirmal Laxminarayan Grover Vs. Appropriate Authority (Income-Tax Department) and Others 223 ITR 572 (Nagpur Bench)**, wherein this Court had dealt with the issue of purchase of immovable property by Central Government notice Under Section 269 UD of the Income Tax Act. In the aforesaid judgment, this Court had categorically held that the order of an Appropriate Authority passed pursuant to such a defective Show Cause Notice was illegal and vitiated for not being in consonance with basic principles of natural justice. The Appropriate Authority had not proved by clear and cogent material that the land in question was significantly under valued and hence, the Court held that the order of compulsory purchase was liable to be quashed. The Court had observed that it was necessary for the

Appropriate Authority to refer to the details in the show cause notice so that the transferor and/or transferee would have real and proper opportunity to meet the case of the Department. The Court had further observed that it was necessary to see that issuing a show cause notice is not merely an empty formality. The conclusions of the Authority at the stage of giving a show cause notice are always prima facie or tentative conclusions and if it is not so, its ultimate order would suffer from its bias i.e. pre-determined mind.

16. In the present case, we are fully convinced that it was not a show cause notice, but a pre-determined order, over and above all relevant materials were never furnished to the Petitioners, thereby violating the principles of natural justice.

17. The aforesaid judgment of this Court is squarely applicable in the present case. Under these facts and circumstances of the case and in view of the above referred Judgment of this Court, the impugned order is liable to be quashed and set aside. Accordingly, the impugned order dated 24th February,1993 is quashed and set aside, and the Petition is allowed and Rule is made absolute in terms of prayer clauses (a), b(i)(ii) and (c), with costs.

(V.C.DAGA,J.) **(DR.S.RADHAKRISHNAN,J.)**